Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: April 29, 1997
CASE NO: 95-INA-618

In the Matter of:

SWEDA CORPORATION
Employer

On Behalf of:

SHIOW-YUN JENG
Alien

Appearance: Kuang-Sheng Tuan
Alhambra, CA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not

adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. *§ 656.27 (c)*.

Statement of the Case

On November 1, 1993, Sweda Corporation ("employer") filed an application for labor certification to enable Shiow-Yun Jeng ("alien") to fill the position of Accounting Manager at a monthly wage of $2,492 (AF 41). The job duties are described as follows:

> Direct financial management functions; devise and implement general accounting systems for financial report and operating procedures; examine accounting records and analyze manufacturing costs; audit contracts, orders and vouchers and prepare reports to substantiate transactions; direct workers engaged in keeping accounts and records; review accounting data and inspect accounts receivable and payable (AF 50).

The job requirements are a Bachelor's degree in Accounting with the special requirement that applicants have the ability to communicate in Taiwanese and Mandarin languages (AF 50).

On September 28, 1994, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which provides that the job requirements as described represent the employer's actual minimum requirements for the employment. The CO argued that the requirement that applicants possess a B.S. in Accounting is not a true minimum requirement because there is no documentation that the alien possesses this degree. The CO noted that the alien's university transcript indicated that she completed only four Accounting courses which is well short of the pre-requisites typically expected of Accounting majors. The CO thus requested that the employer either delete the B.S. requirement and retest the labor market, or justify the requirement and explain why it is not feasible to hire someone with a Bachelor's degree in another field of study (AF 44).

In the NOF, the CO also alleged that the employer violated § 656.21 (b) (2) (I) (A) (B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the Dictionary of Occupational Titles (DOT). Specifically, the CO objected to the employer's special requirement that applicants have the ability to speak Mandarin and Taiwanese. The CO noted that this requirement is not typically expected of Accountants, and alleged it was tailored to meet the alien's background and qualifications. The

[1] All further references to documents contained in the Appeal File will be noted as "AF."

CO therefore requested the employer to delete or alter the foreign language requirements and retest the labor market, or justify that the requirement arises out of business necessity (AF 47).

In rebuttal, dated October 11, 1994, the employer argued that it did not require a B.S. in Accounting, but simply required that applicants possess a Bachelor's degree in any field of study. In support of its position, the employer submitted several tear sheets from newspapers which show that the employer required that applicants possess Bachelor's degrees, but did not specify a particular major (AF 21). The employer also insisted that the foreign language requirement was a business necessity as most of its clients are located in Hong Kong, Taiwan, and China. The employer also stated that it dealt with relatively small companies which employ staffs with limited English speaking skills. The employer further reported that "to negotiate and do business on a constructive business level with the small to mid-size businesses in China and Taiwan, it is a business necessity to accomplish the task of the applicant that they speak Chinese (both Mandarin and Taiwanese)" (AF 22).

The CO issued the Final Determination on January 20, 1995 denying the labor certification. The CO found that the employer did not state the actual minimum requirements. The CO noted that the employer submitted a letter on March 28, 1994 which amended the offer of employment so that Accounting would be designated as the major field of study. The CO concluded that this evidence contradicted the employer's allegation that a Bachelor's degree in any field of study was adequate. The CO also found the employer's argument with regard to the foreign language requirement to be unconvincing. Specifically, the CO stated that the employer did not provide conclusive evidence that showed that a majority of the employer's business was conducted in Taiwanese or Mandarin. The CO thus maintained that the employer remained in violation of § 656.21 (b) (2).

On February 16, 1995, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 2).

Discussion

The issues presented by this appeal are whether the employer's foreign language requirement is unduly restrictive under § 656.21 (b) (2), and whether the employer documented that the job requirements represent the actual minimum requirements for the employment pursuant to § 656.21 (b) (5).

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Furthermore, § 656.21 (b) (2) (I) (C) provides that the job opportunity shall not include the requirement for a language other than English unless that requirement is adequately documented

as arising out of business necessity.

In this case, the employer is a company engaged in the manufacture, import, and wholesale business of electronic products (AF 52). The employer argued that a majority of its business is conducted with small and medium-sized manufacturers in Taiwan and Hong Kong. The employer therefore argued that it is a business necessity that applicants have the ability to communicate in Taiwanese and Mandarin. The employer estimated that 60 percent of the incumbent employee's time will be devoted to speaking Mandarin or Taiwanese, and submitted evidence including a list of 13 overseas customers, customs forms, shipping forms, and a long-distance telephone bill. In the Final Determination, the CO noted that although many of the employer's clients have foreign addresses, most of the contacts have English names such as Steve, Shirley, Richard, William and Steve. The CO also observed that the customs and shipping forms are all in English. Finally, the CO argued that the phone records do not conclusively prove that the conversations were held in Taiwanese or Mandarin. Rather, the CO noted that these phone conversations very well could have been conducted in English.

In *Information Industries,* 88-INA-82 (Feb. 9, 1989) (*en banc*), the Board articulated a two-pronged standard which an employer must meet to demonstrate business necessity. As the *Information Industries* standard has developed in relation to foreign language requirements, the first prong examines whether the employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves this foreign language. The second prong generally focuses on whether the employee's job duties require communicating or reading in a foreign language. With regard to the evidence presented by the employer, it remains unclear what percentage of the employer's business is conducted in a foreign language. Simply because an employer has business associates in foreign lands does not mean that all business is conducted in foreign languages. Also, there is nothing in the record that conclusively establishes that the job duties require communicating in Taiwanese or Mandarin. Therefore, we find that the employer failed to meet the business necessity standard articulated by the Board in *Information Industries, supra*. Accordingly, certification cannot be granted and further examination of the reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.